

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BASIL SEGGOS, Commissioner of the New York State
Department of Environmental Conservation
and Trustee of New York State's Natural Resources,
and the STATE OF NEW YORK,

Plaintiffs,

-against-

THOMAS DATRE, JR. et al.,

Defendants.

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:
: **Civil Action No.**
: **2:17-cv-02684-MKB-LB**
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:
: **DECLARATION OF**
: **JOHN D. DAVIS IN**
: **SUPPORT OF THE STATE'S**
: **MOTION FOR APPROVAL**
: **OF CONSENT DECREES**
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:

I, John D. Davis, declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the following is true and correct:

1. I am an Environmental Scientist in the New York State Office of the Attorney General, attorney for plaintiffs Basil Seggos, as Commissioner of the New York State Department of Environmental Conservation and Trustee of New York State's Natural Resources, and the State of New York (together, the "State") in the above-captioned matter. I submit this declaration in support of the State's motion requesting approval of a consent decree settling the State's claims against Atria Builders, LLC; Triton Construction Company, LLC; Alef Construction Inc.; 158 Franklin Ave. LLC; and Monaco Construction Corp.; a separate consent decree settling the State's claims against IEV Trucking Corp.; and another separate consent decree settling the State's claims against Touchstone Homes LLC.

OVERVIEW OF THE STATE'S TOTAL DAMAGES

2. For purposes of settlement, the State has estimated its total natural resource damages at \$3,902,335. The basis for that number, as explained in detail below, is: (1) the

estimated \$5.84 value of a visit to Roberto Clemente Park in Suffolk County, New York (the “Park”), multiplied by (2) the estimated 668,208 visits to the Park that residents in Brentwood, New York would have made to the Park during the three years it was closed for a cleanup. *See* ECF No. 1, Complaint ¶¶ 87, 101.

THE MONETARY VALUE OF VISITS TO ROBERTO CLEMENTE PARK

3. The State determined the value of visits to the Park by using two different approaches and then averaging the results. The first approach directly applied a methodology developed by the United States Army Corps of Engineers (“Army Corps”) to the Park. The second approach relied on a report by The Trust for Public Land that applied the Army Corps’ methodology to parks in Nassau and Suffolk Counties generally.

The State’s First Approach Uses an Economic Methodology Developed by the United States Army Corps of Engineers

4. Overview of the Methodology. The State’s first approach utilizes an economic methodology developed by the Army Corps that provides “Unit Day Values for Recreation” at different types of facilities. Those values (“Recreation Values”) are used by planners to estimate annual recreation benefits over the life of a project, based on how much an individual would be willing to pay to use a particular recreational facility, taking into account various factors such as the type, quality, and aesthetics of the facility and the distance and accessibility of similar facilities. *See* United States Army Corps of Engineers, *Planning Community Toolbox*, Army Corps Economic Guidance Memorandum, 19-03, Unit Day Values for Recreation for Fiscal Year

2019¹ (“Army Corps Guidance”) at 1, Attachment at 1 (pp. 2, 4 of Army Corps Guidance .pdf, attached hereto as Exhibit A), planning.erdc.dren.mil/toolbox/library/EGMs/EGM19-03.pdf (last visited May 20, 2021).

5. The Army Corps Guidance provides categories or “criteria” to value recreational experiences, along with a range of points that can be assigned to the criteria based upon a park’s characteristics or “judgment factors.” Those points can then be converted into monetary Recreation Values.

6. Applying the Methodology. The following tables show the Army Corps Guidance criteria and judgment factors for evaluating those criteria. The tables also show how the State applied the Guidance and determined that Roberto Clemente Park should be assigned a total of thirty-five points.

¹ The State used the 2019 version of the Army Corps Guidance. The monetary values in the 2020 version do not differ significantly. *See* Army Corps Economic Guidance Memorandum, 20-03, Unit Day Values for Recreation for Fiscal Year 2020 at 2, <https://planning.erdc.dren.mil/toolbox/library/EGMs/EGM20-03.pdf> (last visited May 20, 2021).

Criteria	Judgment factors						Points Assigned	Rationale
Recreation experience ¹ Total Points: 30 Point Value:	Two general activities ² 0-4	Several general activities 5-10	Several general activities: one high quality value activity ³ 11-16	Several general activities; more than one high quality high activity 17-23	Numerous high quality value activities; some general activities 24-30		10	Activities include baseball, soccer, pool, walking
Availability of opportunity ⁴ Total Points: 18 Point Value:	Several within 1 hr. travel time; a few within 30 min. travel time 0-3	Several within 1 hr. travel time; none within 30 min. travel time 4-6	One or two within 1 hr. travel time; none within 45 min. travel time 7-10	None within 1 hr. travel time 11-14	None within 2 hr. travel time 15-18		1	Several substitutes available within 30 minutes to 1 hour travel time
Carrying capacity ⁵ Total Points: 14 Point Value:	Minimum facility for development for public health and safety 0-2	Basic facility to conduct activity(ies) 3-5	Adequate facilities to conduct without deterioration of the resource or activity experience 6-8	Optimum facilities to conduct activity at site potential 9-11	Ultimate facilities to achieve intent of selected alternative 12-14		7	Significant parking available as well as soccer and baseball field
Accessibility Total Points: 18 Point Value:	Limited access by any means to site or within site 0-3	Fair access, poor quality roads to site; limited access within site 4-6	Fair access, fair road to site; fair access, good roads within site 7-10	Good access, good roads to site; fair access, good roads within site 11-14	Good access, high standard road to site; good access within site 15-18		11	Good access to Park via roads
Environmental quality Total Points: 20 Point Value:	Low aesthetic factors ⁶ that significantly lower quality ⁷ 0-2	Average aesthetic quality; factors exist that lower quality to minor degree 3-6	Above average aesthetic quality; any limiting factors can be reasonably rectified 7-10	High aesthetic quality; no factors exist that lower quality 11-15	Outstanding aesthetic quality; no factors exist that lower quality 16-20		6	Average aesthetics with factors that lower quality to minor degree

See Army Corps Guidance, Attachment at 5-6 (pp. 8-9 of .pdf), Table 1. Footnotes provided in the Army Corps Guidance for Table 1 are reproduced here.²

7. The Army Corps Guidance's monetary Recreation Values corresponding to point values are shown in the following table:

Point Values	General Recreation Values (1)
0	\$ 4.14
10	\$ 4.92
20	\$ 5.44
30	\$ 6.21
40	\$ 7.77
50	\$ 8.80
60	\$ 9.58
70	\$ 10.10
80	\$ 11.13
90	\$ 11.91
100	\$ 12.43

See Army Corps Guidance at 2 (reproduced in relevant part, excluding point values for fishing, hunting, etc.).

8. Thirty-five points corresponds to a Recreation Value between \$6.21 (thirty points) and \$7.77 (forty points). Taking the average of these two amounts, the Army Corps' methodology produces an estimated Recreation Value of **\$6.99** per visit to the Park.

² (1) Value for water-oriented activities should be adjusted if significant seasonal water level changes occur. (2) General activities include those that are common to the region and that are usually of normal quality. This includes picnicking, camping, hiking, riding, cycling, and fishing and hunting of normal quality. (3) High quality value activities include those that are not common to the region and/or Nation, and that are usually of high quality. (4) Likelihood of success at fishing and hunting. (5) Value should be adjusted for overuse. (6) Major esthetic qualities to be considered include geology and topography, water, and vegetation. (7) Factors to be considered to lowering quality include air and water pollution, pests, poor climate, and unsightly adjacent areas.

The State's Second Approach Uses a Report by The Trust for Public Land

9. The State's second approach relies on a report prepared by The Trust for Public Land that also used Army Corps' Recreation Values to determine the values of visits to different types of parks in Nassau and Suffolk Counties generally. *See* The Trust for Public Land, *The Economic Benefits and Fiscal Impact of Parks and Open Space in Nassau and Suffolk Counties, New York* (2010) (the "Trust Report") at 23-24 and Table 5 (attached as Exhibit B), <https://www.tpl.org/nassau-and-suffolk-counties-park-benefits> (choose "Download") (last visited May 20, 2021).

10. The Trust Report estimated that in general, visits to parks in Suffolk County that have sports facilities are worth \$3.98. *See* Trust Report at p. 24. The Trust Report also provided lower and higher values for visits to parks in Suffolk County that are used for general park purposes (*e.g.*, playgrounds, walking) or for special uses (*e.g.*, festivals, attractions), respectively. *Id.* Because the Park has been used for all of these purposes, *see* Complaint ¶¶ 69-70, the State used the middle value of \$3.98. Adjusting \$3.98 for inflation using the Consumer Price Index for the New York metropolitan area, the per-visit value to the Park based on the Trust Report is **\$4.69**.³

³ The State adjusted for inflation based on the change in prices for general consumers in the New York metropolitan area during the ten-year period from May 2009 to May 2019. *See* U.S. Bureau of Labor Statistics, *Consumer Price Index - New York-Newark-Jersey City, NY-NJ-PA*, <https://www.bls.gov/regions/new-york-new-jersey/data/xg-tables/ro2xgcpiny1967.htm> (last visited May 20, 2021). The Trust Report uses 2009 dollars, *see* Trust Report at 23, and the State developed its settlement formula around May 2019.

The Average Between the State's Two Valuation Approaches Is \$5.84.

11. Taking the average of these two approaches $((\$6.99 + \$4.69)/2)$ yields a per-visit value to the Park of **\$5.84**.

THE NUMBER OF LOST VISITS TO ROBERTO CLEMENTE PARK

12. The State estimates that residents in Brentwood would have visited the Park 222,736 times each year during the three years that the Park was closed. To calculate that estimate, the State began with statistical studies showing how many people visits parks generally and how often they do so. Then, to calculate the number of people that would have visited the Park, the State relied on statistical studies showing the distance that people travel to visit parks and census data showing the number of people that live in proximity to the Park.

How Many People Visit Local Parks and How Frequently They Do So

13. Seventy-Eight Percent of People Visit Local Parks. A 2015 nationwide survey of individuals aged fifteen and older reported that seventy percent of respondents personally used local parks. See National Recreation and Park Association, *Americans' Use and Perceptions of Local Recreation and Park Services: A Nationwide Reassessment* (the "2015 Park Report") at 2, 27 and Table 4 (attached hereto as Exhibit C), nrpa.org/uploadedFiles/nrpa.org/Publications_and_Research/Research/Park-Perception-Study-NRPA-Full-Report.pdf (last visited May 20, 2021); see also *id.* at 1, 6 (noting that a "landmark" study in 1992 made a similar finding of seventy-five percent). A similar 2019 survey of adults aged eighteen and older reported that six out of seven (or eighty-five percent) of respondents had visited a local park or recreation facility within the past year. See National Recreation and Park Association, *2019 Engagement With Parks Report* (the "2019 Park Report") at 1, 7 (attached

hereto as Exhibit D), nrpa.org/globalassets/engagement-survey-report-2019.pdf (last visited May 20, 2021).

14. The State averaged these figures to estimate that seventy-eight percent of people visit local parks each year.

15. People Who Visit Local Parks Do So Twenty-Four Times Per Year. According to the 2019 Park Report, respondents who visited a local park visit in the previous year did so twenty-four times on average. 2019 Park Report at 5.

How Many People Would Have Visited the Park

16. Most visits to local parks are made by local residents. According to one study, sixty-four percent of visits to neighborhood parks are made by people who reside within a half mile. *See* Deborah A. Cohen et al., American Journal of Public Health, *Contribution of Parks to Physical Activity* at 512 (attached as Exhibit E), ncbi.nlm.nih.gov/pmc/articles/PMC1805017/pdf/0970509.pdf (last visited May 20, 2021).

17. Based on the above, the State initially estimated the number of yearly visits to the Park that would have been made by residents living within one-half mile. The State then looked at a broader radius.

18. Park Visits by People Who Live Within One-Half Mile of the Park. Based on my office's analysis of 2010 United States census data, 10,481 people live within a half mile of Roberto Clemente Park ("local residents"), assuming an even distribution of population across census blocks.⁴

⁴ My office conducted this analysis in 2019 based on the most recent data available at that time from the United States Census Bureau—2010 population data and 2019 census block maps. A similar analysis conducted today could result in a slightly different result.

19. Assuming that seventy-eight percent of local residents visit local parks at all, as discussed above, that means that 8,175 people living within one-half mile of the Park visit local parks each year ($10,481 \times .78 = 8,175.18$). If these local residents each made twenty-four trips to local parks, that yields a total of 196,204 to trips to local parks by them ($8,175.18 \times 24 = 196,204.32$).

20. The Park covers approximately thirty acres. Complaint ¶ 69. There are no other parks within a half-mile radius but there are twelve acres of playgrounds and fields at Frank J. Cannon Southeast Elementary School, located about one-half mile away.^{5, 6} Assuming that these school playgrounds are available to the general public twenty-five percent of the time, these areas provide the equivalent of three-acres of substitute parks for local residents ($12 \text{ acres} \times .25 = 3 \text{ acres}$). Local residents thus make approximately nine percent of their local park visits to the

⁵ In order to make this determination, the State first identified local public parks by referring to the Town of Islip's website. See Town of Islip, <https://islipny.gov/parks-search> ("Islip Park List") (last visited May 20, 2021). Second, the State excluded the following parks because they are not substitutes for the Park: Brentwood Railroad Memorial Park, which is another name for Ross Memorial Park; and Candlewood Memorial Park, which is a traffic island. Third, the State identified local public schools with park areas by referring to the Institute of Education Services ("IES"), which is a statistics and research arm of the U.S. Department of Education. See IES, National Center for Education Statistics, ("School Park List"), <https://nces.ed.gov/programs/maped> (choose K-12 Schools in the Explore and Download Data section at the bottom of the page; select continue; choose Public School Locations 2016-17; under the Download drop-down menu, choose Full Dataset Shapefile, which can be opened using geographic information system (also known as "GIS") software (last visited May 20, 2021). The State assumed that park areas at private schools would not be publicly-accessible.

⁶ The State determined the size of park areas by examining GIS data. See New York State, *Suffolk County Direct Download (2016)* ("Suffolk County GIS Data"), <http://gis.ny.gov/gateway/mg/2016/suffolk/> (choose "State Plane 2016" zip file download link for Islip (North), Town of) (last visited May 20, 2021).

Cannon School (3 acres at the Cannon School + 30 acres at the Park = 33 acres; $3/33 = .09$) and ninety-one percent of their local park visits to the Park ($1.0 - .09 = .91$).

21. Therefore, residents living within one-half mile of the Park make 178,546 visits to the Park annually ($196,204.32 \text{ total visits} \times .91 = 178,545.93$).

22. Park Visits by People Who Live More than One-Half Mile Away from the Park.

As discussed above, as a general matter approximately sixty-four percent of visits to local parks are made by those who live one-half mile away or less. Thus thirty-six percent of local park visits are made by people who live more than one-half mile away ($1.0 - .64 = .36$).

23. As also noted above, people who live within one-half mile of the Park visit it 178,546 times per year. If this number represents sixty-four percent of all annual visits to the Park, then a total of 278,978 visits are made to the Park each year by people living anywhere ($178,546/.64 = 278,978.125$). The number of visits made to the Park by people who live more than one-half mile away is thus expected to be 100,432 ($278,978.125 \text{ total visits} - 178,546 \text{ visits by local residents} = 100,432.125$). However, this number does not account for substitute parks in the expanded geographic area.

24. To account for substitute parks, the State looked at an expanded geographic area defined by the Hamlet of Brentwood for the western, southern, and eastern boundaries and the Long Island Rail Road as the northern boundary. *See* Suffolk County, New York, *Hamlet Polygon*, https://opendata.suffolkcountyny.gov/datasets/e103f9d1e79549519a69976e0750401d_0?geometry=-74.642%2C40.593%2C-70.706%2C41.319 (under the Download drop-down menu, choose Full Dataset Shapefile and open in GIS Software) (last visited May 20, 2021). Within this area there are a total of 18.7 acres of additional parks (Freeman Avenue Park, Noble Street Park, Ross

Memorial Park, Michael Cacciuttolo Park, Brentwood Recreation Center, Gil Hodges Park, and Modern Times Park). *See* Islip Park List; Suffolk County GIS Data. There are also an additional 64.7 acres of playground field areas at schools (Brentwood High School, South Middle School, Oak Park Elementary School, East Middle School, East Elementary School, Loretta Park Elementary School, and Laurel Park Elementary School). *See* School Park List; Suffolk County GIS Data. Assuming, as above, that these school park areas are available to the public only twenty-five percent of the time, these areas provide an additional 16.2 acres of substitute parks for non-local residents ($64.7/4 = 16.175$).

25. Thus there are a total of approximately thirty-eight acres of substitute parks for the Park within the expanded geographic area (3 acres at the Cannon School + 18.7 acres of other parks + 16.2 acres at other schools = 37.9 acres). Adding the thirty acres of the Park, there are sixty-eight total acres of total recreational area in the expanded geographic area (38 acres of substitute parks + 30 acres at the Park = 68 acres), of which fifty-six percent are substitute parks ($38 \text{ acres of substitute parks} / 68 \text{ total acres} = .558$). Assuming that acreage is proportional to visitation, then forty-four percent of the 100,432 visits to local parks made by people who live more than one-half mile from the Park are made to the Park itself, for a total of 44,190 ($100,432 \times .44 = 44,190.08$).

26. The Park Receives 222,736 Visits Annually, and 668,208 Visits Over Three Years. If Roberto Clemente Park receives 178,546 visits each year by people living within a half mile of the Park and 44,190 visits each year by people who live farther away, then there are a total of 222,736 total visits to the Park each year ($178,546 + 44,190 = 222,736$). Multiplying this amount by three years equals a total of **668,208** lost visits to the Park over three years.

THE STATE'S TOTAL NATURAL RESOURCE DAMAGES

27. Multiplying the value of each visit to the Park (\$5.84) by the total number of visits to the park (668,208) yields, for settlement purposes, a total damages figure of **\$3,902,334.72.**

Dated: Albany, New York
May 26, 2021

/s/ John Davis